80-278

Supreme Court, U. S.
FILED
AUG 21 1980
MICHAEL RODAK, JR., CLERK

No._____

IN THE

Supreme Court Of The United States

October Term, 1980

Lee Munson, Prosecuting Attorney,
Sixth Judicial District,
State of Arkansas
Petitioner

v.

Thomas Womack,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PHILIP K. LYON
AND J. BRUCE CROSS
House, Holmes & Jewell
1550 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

Counsel for Petitioners

QUESTIONS PRESENTED

1. WHETHER THE PANEL OF THE EIGHTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE TEST SET FORTH IN *McDONNELL DOUGLAS CORP. V. GREEN* CONCERNING THE BURDEN WHICH IS PLACED UPON THE DEFENDANT ONCE A *PRIMA FACIE* CASE OF DISCRIMINATION HAS BEEN ESTABLISHED BY THE PLAINTIFF?

2. WHETHER THE PANEL GAVE PROPER DEFERENCE TO THE TRIAL JUDGE REGARDING HIS FINDINGS OF CREDIBILITY?

TABLE OF CONTENTS

Page

Opinion Below.....2

Jurisdiction.....2

Statement of the Case.....3

Reasons for Granting the Writ

I. The decision by the Panel of the Eighth Circuit Court of Appeals in this case is in direct conflict with applicable decisions of this Court which have held that the burden which is placed upon the Defendant once the Plaintiff has established a *prima facie* case of discrimination is to *articulate* a legitimate nondiscriminatory reason for discharge. The Eighth Circuit has instead effectively changed Defendant's burden to that of proving the absence of any discriminatory motive. The imposition of such a burden upon the Defendant is not in line with decisions of both this Court and those of the other circuits. Therefore, review of the Eighth Circuit's decision should be granted in order to settle the conflict.....5

II. The Panel of the Eighth Circuit Court of Appeals did not give proper deference to the trial judge regarding his credibility findings 9

Page

Conclusion 10

Appendix A 1a

Appendix B 16a

Appendix C 19a

Appendix D 21a

Appendix E 31a

CITATIONS

Cases

Ambush v. Montgomery City Government,
22 FEP Cases 1101 (4th Cir. 1980) 8

Board of Trustees of Keene State College v. Sweeney,
439 U.S. 24 (1978) 6, 7, 8

Furnco Construction Corp. v. Waters,
438 U.S. 567 (1978) 6, 7, 8

Jackson v. United States Steel Corp.,
22 FEP Cases 1819 (3d Cir. 1980) 8

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 6, 7, 8

NLRB v. Oil Workers Local 6-578,
103 LRRM 2895 (8th Cir. 1980) 9

Wooten v. New York Telephone Co.,
22 FEP Cases 1742 (S.D.N.Y. 1980) 8

No._____

IN THE

Supreme Court Of The United States

October Term, 1980

Lee Munson, Prosecuting Attorney,
Sixth Judicial District,
State of Arkansas
Petitioner

v.

Thomas Womack,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Lee Munson, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 17, 1980 and the rehearing of such, which was denied on May 23, 1980.

OPINION BELOW

The opinion of the court of appeals is not yet reported and appears as Appendix A.

The Judgment of the court of appeals appears as Appendix B.

The Denial of Rehearing is attached as Appendix C.

The district court's Findings of Fact and Conclusions of Law appear as Appendix D.

The Judgment of the district court appears as Appendix E.

JURISDICTION

The judgment of a Panel of the Court of Appeals for the Eighth Circuit was entered on April 17, 1980. The petition for rehearing was denied on May 23, 1980. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Thomas Womack (hereinafter Respondent) was hired as an investigator by Lee Munson (hereinafter Petitioner), then Prosecuting Attorney for the Sixth Judicial District of the State of Arkansas, on February 1, 1975. Petitioner hired Respondent with full knowledge that he had earlier filed an EEOC charge against Sheriff Monroe Love. However, the EEOC charge did not contain allegations that black officers were required to abuse black suspects.

On June 3, 1975, Respondent filed a class action lawsuit against Sheriff Monroe Love alleging race discrimination. On or about June 5, 1975, Petitioner's office became aware of the lawsuit. On that same day, Petitioner met with Respondent, Deputy Wilbur Calvin Bentley (later Chief Deputy), Chief Deputy Henry Ginger, and Deputy Lloyd Haynes. Petitioner was concerned about a potential conflict of interest which might be raised by the fact that his employee (Respondent) was suing a party (Sheriff Love) whom Petitioner had the responsibility of defending. Additionally, Respondent's complaint for the first time made the startling allegation against Sheriff Love that the Sheriff *required* black officers to physically abuse black suspects. Logically, Petitioner was concerned about any activity of this nature as well as why he had not been informed of these potentially illegal actions. Petitioner therefore asked Respondent about the nature of the lawsuit at this meeting. During the course of this meeting Respondent admitted his own participation in the physical abuse of blacks.

Such an admission rightfully concerned the Petitioner. In pursuing his duties as an investigator in Petitioner's office, Respondent was required to carry a gun and testify in criminal actions. His credibility was thus subject to attack and could endanger the status of any cases he might handle.

Thus, Petitioner's main concern became not the filing of the lawsuit, but, rather, the effect that Respondent's admission would have upon pending and future cases. In fact, during this meeting, Respondent offered to withdraw the lawsuit, but was told not to do so. Petitioner's office launched an investigation concerning Respondent's allegations. During the course of the investigation, Respondent was placed on leave of absence with pay. Petitioner also offered to find Respondent other suitable employment because of the sensitive nature of the situation.

The investigation disclosed nothing which corroborated Respondent's allegations. Hence, Petitioner was faced with either of two conclusions: (1) Respondent had lied not only to him but also in the legal complaint filed in federal court, or (2) that Respondent's statements and admissions were true and he had abused blacks in his official capacity. Either conclusion made it clear that Respondent could not be retained in the sensitive position he held. Thus, on June 26, 1975 Respondent was discharged.

Respondent subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission against the Pulaski County Prosecutor's Office. Respondent received a Right-to-Sue Letter on June 18, 1976 and filed suit on September 16, 1976. Jurisdiction was based upon 42 U.S.C. § 2000e-5(f)(3).

District Judge Richard S. Arnold ruled in favor of Petitioner finding his version of the facts to be credible as well as uniformly presented.

Respondent appealed that decision and on April 17, 1980 the Eighth Circuit Court of Appeals reversed Judge Arnold's decision and remanded the cause for findings and a determination on Respondent's request for back pay. Petitioner filed a Petition for Rehearing and Suggestions for Rehearing en banc which were denied on May 23, 1980.

Petitioner now petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I. The decision by the Panel of the Eighth Circuit Court of Appeals in this case is in direct conflict with applicable decisions of this Court which have held that the burden which is placed upon the Defendant once the Plaintiff has established a *prima facie* case of discrimination is to *articulate* a legitimate non-discriminatory reason for discharge. The Eighth Circuit has instead effectively changed Defendant's burden to that of proving the absence of any discriminatory motive. The imposition of such a burden upon the Defendant is not in line with decisions of both this Court and those of the other circuits. Therefore, review of the Eighth Circuit's decision should be granted in order to settle the conflict.

This Petition focuses upon the need for uniformity among the circuits concerning the burden of proof which a defendant must meet in order to rebut a plaintiff's *prima facie* showing of discrimination. Petitioner contends that

this Court has established what the burden should be in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and has re-emphasized it in subsequent cases. *See, e.g., The Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). However, the Eighth Circuit Court of Appeals did not heed this Court's directions and, in effect, placed upon Petitioner the burden of proving the absence of any discriminatory motive for Respondent's discharge.

In *McDonnell Douglas* this Court stated that in a Title VII trial the Complainant carries the initial burden of establishing a *prima facie* case of racial discrimination. Once that is accomplished, however, the burden shifts to the employer "to articulate some legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the employer articulates a reasonable non-discriminatory basis for his actions, then it is up to the complainant to show that the stated reason was merely a pretext.

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), this Court further explained that an inference of discrimination is raised by a *prima facie* case only because if such acts are not otherwise explained, then more likely than not they were based on impermissible factors. However, the employer may dispel the adverse inference by articulating some legitimate non-discriminatory reason for his action. *Id.* at 578.

Additionally, in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), this Court again emphasized that the employer need only *articulate* non-

discriminatory reasons and that there is a significant difference between that and proving the absence of discriminatory motive. The judgment of the court of appeals was thus vacated and the case remanded because a heavier burden was imposed upon the employer than was justified by *Furnco.*

In the case at hand, the district court weighed the evidence which was presented, and found for the Petitioner under the rationales of *McDonnell Douglas* and *Sweeney.* The court of appeals, however, looked for a way to shift the burden to Petitioner to prove the absence of discriminatory intent--all the while saying that they were not. The Petitioner presented testimony from several persons establishing that the reason for Respondent's discharge was a legitimate non-discriminatory one, *i.e.*, the sensitive nature of his position required that his credibility be unquestioned, yet either he engaged in the abuse of blacks or stated falsely that he had done so. Either of these actions would certainly be impermissible conduct for an employee in his position. Respondent, on the other hand, relied solely upon his own testimony. The district court judge, who had the opportunity to view the witnesses' demeanor, accepted the Petitioners version of the facts and found in his favor. The court of appeals, conversely, ruled as a matter of law that Petitioner's reason for discharging Respondent was not a legitimate one when, in fact, as a matter of law it should be.

Petitioner's actions were not motivated by Respondent's lawsuit. Rather, in discussing the lawsuit, Respondent admitted having taken actions, *i.e.*, abusing blacks, which seriously jeopardized his effectiveness in his job. The implications of such an act would clearly be

separate and apart from the filing of the Title VII lawsuit. Thus, Petitioner was completely justified in discharging Respondent. In fact, Petitioner conceivably could have been found to be derelict in his duties had he not done so.

In short, Petitioner met his burden. He articulated a legitimate basis for discharge. The court of appeals' refusal to accept the legitimacy of Petitioner's reason means, in effect, that they were requiring him to prove the absence of any discriminatory motive. Petitioner contends that they were in error for extending his burden too far.

Cases from other circuits indicate that they have interpreted and applied the rationales of *McDonnell Douglas*, *Furnco* and *Sweeney* in the manner adopted by the district court and propounded by Petitioner. For example, in *Ambush v. Montgomery City Government*, 22 FEP Cases 1101 (4th Cir. 1980), the court stated that the employer's burden is met when he shows, explains or articulates a legitimate reason for his action. He does not have to prove the absence of discriminatory motive. In *Wooten v. New York Telephone Co.*, 22 FEP Cases 1742 (S.D.N.Y. 1980), the district court recognized that "articulating" a proposition of fact necessarily involved some sort of proof; however, the court emphasized that the employer does not have the burden of proving a non-discriminatory reason. In *Jackson v. United States Steel Corp.*, 22 FEP Cases 1819 (3d Cir. 1980), the Third Circuit Court of Appeals found a lower court to be in error in requiring an employer to prove the absence of discriminatory motive by a preponderance of the evidence. The court of appeals stated that "[t]he burden imposed on the employer, after the complainant has made a *prima facie* showing of discrimination, is only the burden of producing evidence of legitimate, non-discriminatory reasons." *Id.* at 1823.

The Eighth Circuit, on the other hand, appears to be giving verbal credence to the standards enunciated by this Court, but in effect, they are imposing a heavier burden upon the employer than this Court has indicated is necessary in order to dispel an inference of discrimination. Thus, the Eighth Circuit's decision presents serious problems for persons attempting to sort out and understand the shifting burdens of proof in Title VII cases. There is a great deal of litigation in this area and the need for clear guidelines and uniformity among the circuits is obvious.

II. The Panel of the Eighth Circuit Court of Appeals did not give proper deference to the trial judge regarding his credibility findings.

It is well established that a trial judge or other trier of fact should make credibility findings. The trial judge in this case found in favor of Petitioner. The credibility to be afforded witnesses' testimony is within the trier of fact's sound discretion and his findings should be reversed only in extraordinary circumstances. *NLRB v. Oil Workers Local 6-578*, 103 LRRM 2895 (8th Cir. 1980).

As mentioned in connection with the discussion in Section I of this petition, the court of appeals in this case substituted its judgment for that of the trier of fact under less than extraordinary circumstances. It was in error for doing so.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the Judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

PHILIP K. LYON
AND J. BRUCE CROSS
House, Holmes & Jewell
1550 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1306

Thomas Womack, Appellant,	)	
v.	)	Appeal from the United States District Court for the Eastern District of Arkansas.
Lee Munson, Prosecuting Attorney for the Sixth Judicial District of Arkansas, Appellee.	)	

Submitted: November 6, 1979

Filed: April 17, 1980

Before LAY, Chief Judge,* BRIGHT and McMILLIAN, Circuit Judges.

LAY, Chief Judge.

This appeal challenges judgment entered in favor of the defendant in a Title VII action that alleged retaliatory discharge from employment.[1] Thomas Womack had worked in various positions since 1966 in the county sheriff's department and the state district prosecutor's office. He was discharged from employment as a deputy sheriff in 1973, and filed a complaint with the Equal Employment Opportunity Commission, (EEOC), protesting the discharge.[2] In February 1975 he was hired as an investigator by the state prosecutor, Lee Munson. In June 1975 Womack filed a class action suit against the sheriff based upon the allegations contained in his EEOC charge. Shortly thereafter Munson questioned Womack about the lawsuit and suspended him; an investigation followed, and Womack was discharged 20 days later.

The district court found Womack had made a *prima facie* case of retaliatory discharge, but that Munson had established an independent, nondiscriminatory ground for the discharge. It dismissed the complaint. We reverse with directions to enter judgment for Womack, and to award back pay from the date of discharge.[3]

---

* The Honorable Donald P. Lay became Chief Judge of the Eighth Circuit on January 1, 1980.

[1] The action was brought under section 704 (a) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a).

[2] Womack, a black, charged in the EEOC complaint that his race and his testimony on behalf of the defense in a murder prosecution were the reasons for his termination. he alleged he had refused the sheriff's instructions to bar whites from black operated private clubs, and also alleged discrimination against blacks generally by the sheriff's office.

[3] Womack has had other employment which must be considered in mitigation of his back pay award.

I. *Facts.*

Womack filed the lawsuit against the sheriff on June 3, 1975. On Thursday morning, June 5, 1975, Munson called Womack into his office to "determine what sort of a lawsuit this was." Munson testified his initial concern was the potential conflict of interest raised by his employee suing a party whom he had the responsibility of defending. According to a June 9 memorandum filed by chief deputy prosecutor Bentley, Womack was told at this June 5 meeting that he had placed the prosecutor's office in an embarassing position because it would appear the office sanctioned his charges, and there was a further problem because the office was responsible for defending the sheriff. Munson verified these statements on cross-examination by admitting the lawsuit put him in an awkward position, and that retaining Womack on his payroll might give the sheriff and others the impression he sanctioned the charges. At the June 5 meeting, Womack asked if Munson wanted him to withdraw the lawsuit. Munson said he did not want him to, but was concerned with the position the lawsuit put his office in at the particular time. Munson then suggested Womack take a leave of absence with pay and offered to help him find suitable employment.

At this initial meeting Womack was questioned about an allegation in the lawsuit concerning abuse of suspects by the sheriff's office, and his knowledge of and involvement in the abuse. He testified at trial that he told Munson that the sheriff's practice was to call in black officers when white officers were interrogating black suspects. He stated he had once been "called in" when a white officer was abusing a black suspect. Munson, Bentley and deputy prosecutor Haynes testified Womack said at the

June 5 meeting that he had personally participated in the physical abuse of black prisoners in order to keep his job. Womack denied making the statement. The trial judge credited Munson's testimony that Womack had made this admission on June 5.

On the morning of Monday, June 9, Womack told Bentley he did not want to leave and take a job Bentley had suggested to him on June 6. Later that day, Womack was placed on leave of absence and told the matter of mistreatment of black prisoners would be investigated. Deputy prosecutor Crank, who had been put in charge of the investigation, then interrogated him further. Womack refused to give a sworn statement without a lawyer present. In response to Crank's questions he denied he had said at the June 5 meeting that he had personally been required to brutalize anyone.

Crank investigated and failed to find any corroboration for Womack's allegations that black deputy sheriffs had been required to abuse black suspects.[4] Crank orally reported his findings to Munson and Bentley on June 26. Munson determined after consultation with Bentley and others in the office, that Womack should be discharged. Bentley told Womack he was fired on June 26. Both Bentley and Munson testified the main reason for Womack's discharge was his denial that he had told them on June 5 that he had personally abused black suspects. According to Munson, regardless of whether Womack had in fact physically abused suspects or had lied about it, either

---

[4] The district court noted this was "not surprising," since most of the persons interviewed appear to have been those who worked or had worked for the accused, the sheriff.

situation was "untenable" and Womack had to be fired. This was given in the pretrial stipulation as Munson's "business reason" for the discharge, and was Munson's defense theory at trial.

Bentley's memorandum to his file, dated June 26, stated Womack's discharge was for: (1) moonlighting as an armed security guard; (2) campaigning for political office; and (3) his admission that he had mistreated blacks while employed as a deputy sheriff. No mention was made of Womack's denial of the admission. Bentley testified he had informed Munson of the first two reasons, but that the principal reason for Womack's discharge was the admission of abuse.[5] Munson testified the real or primary reason was the admission coupled with the subsequent denial.

II. *Legal Standards.*

Section 704(a) of title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
> 42 U.S.C. § 2000e-3(a).

---

[5] Bentley's written response to an EEOC investigation, dated August 13, 1975, was that Womack was unsuitable because of several shortcomings. He included marginal productivity and poor judgment among these. However, Bentley admitted on cross examination that Womack would not have been fired for unsatisfactory job performance.

The order and allocation of proof in title VII suits generally, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978) (per curiam), is also applied in cases alleging retaliation for participation in title VII processes. *See Garrett v. Mobil Oil Corp.*, 531 F.2d 892, 895 (8th Cir. 1976); *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779, 781 (9th Cir. 1976); *Hochstadt v. Worcester Foundation*, 425 F.Supp. 318, 324 (D. Mass), *aff'd*, 545 F.2d 222 (1st Cir. 1976); B. Schlei, Employment Discrimination Law, ch. 15 at 436 (1976). Section 704(a) requires a plaintiff to show: (1) statutorily protected participation; (2) adverse employment action; and (3) a causal connection between the two. *Hochstadt v. Worcester Foundation*, 425 F. Supp. at 324; B. Schlei, *supra* at 417. Once Womack had made out a *prima facie* case of retaliatory termination, the burden shifted to Munson to articulate a legitimate, nondiscriminatory reason for the dismissal. *Miller v. Williams*, 590 F.2d 317, 320 (9th Cir. 1979); *Hochstadt v. Worcester Foundation*, 425 F.Supp. at 324. Munson did not have to prove absence of retaliatory motive, but only produce evidence that would dispell the inference of retaliation by establishing the existence of a legitimate reason. *Furnco Construction Corp. v. Waters*, 438 U.S. at 577-78, *Kirby v. Colony Furniture Co.*, No. 78-1808, slip op. at 9-10 (8th Cir. Jan. 9, 1980). If Munson produced evidence of a reason other than retaliation, Womack could still prevail if the evidence showed the proferred justification was in fact a pretext, a cover up for retaliation. *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d at 781; *Hochstadt v. Worcester Foundation*, 425 F.Supp. at 324. The overall burden of persuasion remained with Womack.

III. *Analysis.*

We hold the district court erred in concluding Munson's reason for discharge was a legitimate and nonretaliatory one. We also hold Womack met his burden of showing he was discharged because of the lawsuit he filed against the sheriff.

A. *Legitimacy of the Reason for Discharge.*

We agree with the district court that Womack made out a *prima facie* case of retaliatory discharge.[6] It is a strong case. The evidence shows that Munson initially called Womack in upon learning of the lawsuit, before Womack had made any admission. At that meeting, Munson told Womack he wanted him to leave because his continued employment in the prosecutor's office was an embarrassment. Within five days of this discussion Womack was suspended; within twenty days he was fired.

The district court found Munson established a legitimate, nondiscriminatory reason for the discharge: Womack's admission of physically abusing black suspects and subsequent denial of both the admission and the abuse. We agree that there is substantial evidence to support the finding that the admission and denial occurred, and although the evidence is contradictory, that Munson and his chief deputy considered these as factors in their decision to terminate Womack. We differ with the district court in its

---

[6] The district court found Womack had made out a prima facie case of retaliatory discharge by showing: (1) filing the lawsuit against the sheriff (a protected activity); (2) that Munson was aware of the lawsuit; (3) that Womack was subsequently discharged; and (4) that discharge followed the protected activity so closely as to justify an inference of retaliatory motive.

legal conclusion that these factors were sufficiently independent from the filing of the complaint to constitute legitimate and nonretaliatory reasons for discharge under section 704(a).

Womack alleged in his complaint that the sheriff required black deputies to physically abuse black suspects. Womack's standing to raise that claim stemed from his prior employment as a black deputy sheriff—the crux of his complaint was racial discrimination in his discharge from the sheriff's office. The complaint itself necessarily implies Womack had personal knowledge of such abuse, or at the minimum, that the abuse affected him sufficiently to challenge it. Thus, Womack's admission of personal knowledge of or participation in the abuse varies little from the allegation he made in his complaint. The admission was made in a meeting in which Womack was being interrogated about the allegations in the complaint. In Munson's own words, the allegation and admission were "all wrapped up in one statement." We conclude the admission and denial of abuse by Womack are so inextricably related to the allegation in the complaint that they cannot be considered independently of one another.

Access to the EEOC and federal courts by filing charges is clearly conduct protected from employer retaliation by section 704(a). *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 71 n.25 (1975); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969). Filing a lawsuit alleging a former employer violated title VII by requiring black employees to abuse black suspects is protected activity.

In a closely analogous area, retaliatory discharge of public employees for exercise of First Amendment rights, a strict standard is employed to determine causation. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979); *Mt. Healthy City School District v. Doyle*, 429 US. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968). Even if protected conduct is shown to be a substantial factor in the termination decision, the employer may not be liable if the discharge would have taken place even in the absence of the protected activity. *Givhan*, 439 U.S. at 416; *Mt. Healthy*, 429 U.S. at 285-87.[7]

The sole inference the evidence allows here is that Womack's discharge would not have taken place in the absence of the lawsuit he filed against the sheriff. He was initially questioned only because he filed the lawsuit. His admission and denial were responses to employer questions on an allegation he made in the lawsuit: discriminatory, abuse practices by the sheriff's office. They were answers to questions on his personal knowledge of the substance of his allegation. As such, they are virtually inextricable from his protected charge. For purposes of determining the

---

[7] In cases challenging adverse employment actions as racially discriminatory under section 703(a), 42 U.S.C. § 2000e-2(a), we have held the court must look for the "motivating factor" when the evidence suggests mixed motives. *See, e.g., Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1079); *Clark v. Mann*, 562 F.2d 1104, 1116-17 (8th Cir. 1977) (42 U.S.C. § 1983 action). Similarly, the First Circuit has recently held that where motives are mixed, the motive of retaliation for employee opposition to discrimination must be shown to be a "determinative factor" in the discharge decision. *Monteiro v. Poole Silver Co.*, No. 79-1346, slip op. at 9 (1st Cir. Feb. 14, 1980). *See also Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 346 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 792 (1973) (protected activity cannot be even partial cause) (Lay, J., concurring). The test in *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979) and *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977), is stricter than these standards.

nature and extent of protected activity under section 704(a), they are inseparable frm the court complaint that is clearly protected by statute.[8] They therefore share the complaint's protected status, and cannot constitute independent, legitimate reasons for discharge. To hold otherwise would create a facile subterfuge for employer retaliation.

B. *Pretext.*

The district court found that the reason given by Munson for Womack's discharge was not pretextual. Assuming *arguendo* that the reason could be a legitimate basis for discharge, we hold the district court's finding that it was not pretextual is clearly erroneous. Our review of the record leaves us with a firm and definite impression that a mistake was made and that the evidence overwhelmingly established Womack was fired because he filed the lawsuit.

The chronological sequence of events does not support Munson's explanation. Womack's contraverted admission was made on Thursday, June 5. He was discharged on June 26. His denial of the admission was reported to Bentley and Munson on June 9: after the decision to suspend him had been made and over two weeks before he was discharged.

The district court found that Munson's intervening investigation 'substantiated his testimony that Womack's admission and denial put Munson in an untenable situation and required Womack's discharge. Yet the record shows the

---

[8] *See Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (Congress struck balance for employee in case of filing charges).

investigation did not concern Womack's admission or his denial of *personally* abusing suspects. Munson testified verification of Womack's admission of personal involvement was not the point of the investigation.[9] Indeed, the investigation could not logically have had any bearing on the decision to fire Womack, since both his admission and subsequent denial were made before the investigation commenced. The alleged grounds for discharge existed regardless of what the investigation revealed. Moreover, the investigation's independent determination of the truth or falsity of Womack's allegation against the sheriff could not legally have been grounds for discharge under section 704(a). The merits of a charge made against an employer is irrelevant to its protected status. *Abramson v. University of Hawaii*, 594 F.2d 202, 211 (9th Cir. 1979); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969). Access is protected; administrative and judicial mechanisms determine the truth, falsity, frivolousness or maliciousness of an EEOC charge or court complaint. Thus, employer retaliation even against those whose charges are unwarranted cannot be sanctioned. *Abramson*, 594 F.2d at 211.[10]

---

[9] Munson testified the investigation was to see if it would be necessary to call a grand jury or bring charges against the sheriff. He also testified Womack would be an unsuitable employee if his admission were true *or* if the denial were true. Munson's testimony thus undercuts the district court's reliance on the investigation as proof that Munson's stated reason was the principal one and was not a pretext.

[10] In an analogous situation, one claim among four or five colorable ones was held insufficient to deprive the overall EEOC charge of its protected status and allow discharge of the employee who filed it, even if that one claim were later shown to be false or malicious:

> The Employee is not stripped of his protection because he says too much. If he says enough the Employee can suffer no detriment by virtue of having filed charges with EEOC which also contain false or malicious statements. By utilizing EEOC machinery he is exercising a protected right.

Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969).

Womack's subsequent attempt to explain his June 5 statement concerning his personal knowledge of abusive practices in the sheriff's office was not pursued, but simply treated as a denial. Crank failed to find any evidence of physical abuse of any suspect. These facts demonstrate that Womack's admission alone was not the reason for his discharge. This perhaps explains why the reason proferred at trial was the admission coupled with the subsequent denial. The difficulty with this defense is shown by the record. Evidence closest to the actual occurrence is a memorandum by chief deputy Bentley, which was dictated for his file on the same day that he informed Womack of his discharge, June 26. It discredits the defense theory that it was not the admission alone, but the admission and subsequent denial that made discharge inevitable. The memorandum lists three reasons Bentley orally gave Womack to explain the discharge. Two were retracted as motivating reasons by Munson under cross-examination; the third was admission of participation in physical abuse of black suspects. Denial of the admission or untrustworthiness because of the denial are *not* listed. Neither Bentley nor Womack testified the denial was mentioned to Womack as a reason for his discharge, much less the principal reason.

Another memorandum was prepared by Bentley for his file on June 9 that summarizes the initial, June 5, meeting with Womack. It substantiates Womack's testimony by stating that Womack was told at the first meeting that he had "placed this office in an embarrassing position because it would appear that we [the prosecutor's office] sanctioned the charges [against the sheriff]." It also says that Womack was told Munson would like him to take a leave of absence until the lawsuit was settled *before*

Womack was questioned as to the veracity of, and his personal knowledge of, the allegations of physical abuse.

Munson's expression of anxiety over the lawsuit and desire to have Womack leave is significant, because no adverse action was taken against Womack until after he refused, on June 9, to leave voluntarily. The district court stated at the close of trial that it credited the testimony of defense witness Bentley. However, it apparently failed to consider also Bentley's earlier, written account of the events, which had been admitted in evidence. Bearing in mind the district court's credibility determination, we must nevertheless include these memoranda in our review of the entire record. They show predisposition to have Womack leave and failure on June 26 to record for the file, or mention to Womack, that his denial of his earlier admission was a motivating reason for discharge. This must be considered together with the irrelevancy of the investigation to any permissible or proffered reason for discharge, the timing of events, and testimony by both Munson and Bentley that Womack was otherwise a satisfactory employee. We are left with the firm and definite impression that the admission-denial rationale was a pretext to legitimatize the discharge. The record makes clear the real reason for discharge: Womack's lawsuit against the sheriff.

Conclusion.

The judgment is reversed and the cause remanded for findings and a determination on Womack's request for back pay, as he no longer requests reinstatement. Absent extraordinary circumstances, back pay is awarded to fashion the most complete relief possible for proscribed

discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1272 (8th Cir. 1977). Absence of bad faith is not a sufficient reason to deny back pay. *Albemarle*, 422 U.S. at 422. We also note a prevailing plaintiff in a title VII action ordinarily receives attorney fees. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978). Plaintiff's counsel is awarded attorney fees on appeal in the sum of $1,500.00.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1306.....September Term, 1979

Thomas Womack, Appellant,	)	
	)	Appeal from the
v.	)	United States District
	)	Court for the Eastern
	)	District of Arkansas.
Lee Munson, Prosecuting Attorney for the Sixth Judicial District of Arkansas, Appellee.	)	

APPEAL FROM the United States District Court for the Eastern District of Arkansas.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Arkansas and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this casue, be, and the same is hereby, reversed in accordance with the opinion of this Court.

It is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for findings and a determination on Womack's request for back pay.

And it is further ordered that plaintiff's counsel is awarded attorney fees on appeal in the sum of $1,500.00.

April 17, 1980

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1306 ..... September Term, 1979

Thomas Womack, Appellant,	)	
	)	Appeal from the
v.	)	United States District
	)	Court for the Eastern
	)	District of Arkansas.
Lee Munson, Prosecuting Attorney for the Sixth Judicial District of Arkansas, Appellee.	)	

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

Judge Arnold took no part in the decision.

May 23, 1980

APPENDIX D

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

February 16, 1979

Thomas Womack,)
Plaintiff)

v.)

)
Lee Munson,)
Defendant)

THE COURT: All right, gentlemen. I want to thank you both for an able presentation and a well argued case, and on the basis of the evidence and your argument, the Court makes the following Findings of Fact and Conclusions of Law:

The basic facts are agreed to a large extent. It is agreed, for example, that the Plaintiff, Thomas Womack, is a black employee of the Defendant, or former employee, for whom he worked as an investigator. This action was preceded by a timely filing of the charge with the EEOC, and the Plaintiff in due course received notice from that agency of his right to bring this suit.

The Defendant, Lee Munson, was at the time of the events that are relevant to this case a duly elected Prosecuting Attorney of the Sixth Judicial District of Arkansas. The Plaintiff was employed by him as an

investigator in February of 1975. Prior to that he had been employed as a Deputy Sheriff with Monroe Love, who was Sheriff of Pulaski County. He had been discharged by Sheriff Love for reasons that have not been gone into in detail here, and probably did not need to be gone into, but that had something to do with testimony, apparently, that Mr. Womack gave at a murder trial.

In any event, after his discharge by the Sheriff he filed against Mr. Love a charge of racial discrimination with the Equal Employment Opportunity Commission, and a copy of that charge is in evidence as Defendant's Exhibit 1, and it alleges, in substance, that the termination was because of race and because of testimony by Mr. Womack for the defense in a criminal prosecution. It was claimed that white Deputy Sheriffs had testified for the defense but had not been terminated. There was also a mention of instructions that the Sheriff is supposed to have given him to bar whites from black operated private clubs. A couple of other allegations are made in the charge, but the charge nowhere mentions any physical abuse or brutality either on the part of Sheriff Love or of any person under his supervision.

When the Plaintiff was employed by the Defendant in this case, which was in February of 1975, he told the Defendant about the charge before the EEOC that was pending against Sheriff Love, and the Defendant nevertheless employed him, even though at that time the Defendant as Prosecuting Attorney had a duty to represent the Sheriff and to defend the Sheriff in certain circumstances, and, as a matter of fact, the proof shows through the testimony of Robert H. Crank that the Prosecuting Attorney's Office was handling the Sheriff's Answer to the EEOC charge.

In any event, the positions of the parties begin to diverge when we reach June of 1975. At that time it came to the attention of the Defendant employer that the Plaintiff had filed not simply an administrative charge, but a lawsuit in Federal Court here in Little Rock against Sheriff Love. Apparently there was some newspaper publicity about it.

In any event, it was brought home to the Defendant, not only that the lawsuit had been filed, but that the lawsuit alleged, among other things, that Sheriff Love had instructed and required black Deputy Sheriffs, of whom the Plaintiff in this case was one, to abuse black suspects in order to obtain confessions or statements from them by force. At that point the Defendant, Mr. Munson, as he then was, called the Plaintiff in to his office and asked him about the allegations in the suit.

The case, of course, involves motivation, and it is never possible to determine one human beings' motivation with absolute certainty, but the Supreme Court has helped us in this regard by laying out the standards of proof that must be observed in a case of this kind, and those are the standards that govern the Court's determination.

In *McDonnell Douglas* against *Green*, 411 U.S. 702, decided in 1973, the Supreme Court stated that the Plaintiff in a trial of this type, a Title VII trial, must carry the initial burden of showing a *prima facie* case of racial discrimination.

And, incidentally, the Court is going to treat this complaint as if it alleged not only a Title VII claim, but also a 1983 claim. They are closely similar and there is no unfairness in that respect; the proof really doesn't differ.

In any case to get back to what the Supreme Court said. A *prima facie* case, it held, can be made by showing that the plaintiff belongs to a racial minority, and that has been shown here; by showing that he was qualified for a job, and, of course, there is no question that the Plaintiff was qualified, because he was hired and held the job for quite some time; by showing, in addition, despite his qualifications he was rejected, and, of course, the Supreme Court in that context isn't talking about a retaliation case but a failure to hire case; and, finally, that after the rejection the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications.

Now, it is necessary to transpose those criteria and place them in a retaliation context in order to lay the framework for the Court's decision in this matter; and that has been done in an Opinion decided by the United States District Court for the District of Massachusetts called *Hochstadt* against *Worcester Foundation*, 425 F. Supp. 318.

According to that Opinion in order to make a *prima facie* case in a retaliation context an employee must show, first of all, that he engaged in protected activities, and that has been shown here; the filing of the Federal lawsuit against the Sheriff was protected activity, that is, the Plaintiff had a right to file a lawsuit, and to do so free of retaliation.

Secondly it has to be shown that the employer was aware of the protected activities, and everybody agrees that shortly after the lawsuit was filed the Defendant became aware of it.

Thirdly, it has to be shown that the employee was subsequently discharged, and that, of course, has been shown, because he was discharged effective July 15th, 1975.

And, Fourth, that the discharge followed the protected activity in such period of time as would justify an inference of retaliatory motivation. And as Mr. Lyon observed in his closing argument, when you look only at the events and the time period, you can make an inference because the discharge did occur after the lawsuit was filed and, as a matter of fact, after the lawsuit was settled at some later time, the Plaintiff was rehired.

So, the Court holds that the Plaintiff has made a *prima facie* case. That, of course, is not the end of the matter. At that point the burden shifts to the employer to articulate a legitimate non-discriminatory reason for that discharge, and if he does so, then the employee may attempt to demonstrate by evidence that the reasons assigned were, as Mr. Mays says, were pretextual, that is, that they were not the real reasons.

The employer has given at one time or another four separate reasons for his actions. He has stated that the employee's productivity was marginal. He has stated that the employee was moonlighting as an armed security guard in a liquor store. He has stated that employee was engaged in some sort of political activity, and he has stated that the employee admitted personal involvement in physical abuse of black suspects while a Deputy Sheriff.

The first three of those reasons, while it may be an exaggeration to say they have been abandoned, at least are not proffered at this time as the principal reason for the

discharge as the legitimate non-discriminatory cause that the defendant must show. So, it comes down to this: Was he discharged because he sued the Sheriff, or was he discharged because he admitted being involved in physical abuse?

The Court is not convinced that any witness has falsified, but there is a clear conflict of testimony on that point, and the Court holds that the Defendant has established a legitimate non-discriminatory reason for the discharge.

The testimony of the Defendant's witnesses is uniform and consistent, to the effect that the principal reason for the discharge was an admission by the Defendant personally that he physically abused black suspects.

The Plaintiff, of course, denies having made such an admission, and that presents the Court with a difficult problem, but that's why cases come to court.

The Court was particularly impressed with the explicit testimony of Mr. Bentley. He appears to me to be a credible and persuasive witness, and even though he was subjected to an able and searching cross-examination, he stated specifically that the Plaintiff admitted personal involvement in abuse of black suspects.

The Court is not convinced that it was improper for the Defendant Munson to call the Plaintiff into his office to talk about this matter when he learned of the lawsuit. In my judgment that was a natural reaction and one that we would expect of a lawyer, or at any rate, of a public official.

It is true that there are some inconsistencies involved here. If the Plaintiff had been discharged on the spot he might be able to make a more logical and a more consistent case in an abstract fashion for the cause of the discharge, and that was not done.

But life is untidy and most of our decisions are, at least to some extent, tinged with inconsistency from time to time. The problem for the Court to determine is what was principal motivation.

The final decision to discharge the Plaintiff was not made until the 26th of June, and some things happened in the interim that are material to the Court's conclusion.

First of all, an investigation was made of the allegation, and here we have an allegation that goes to the very heart of a criminal justice agency. I don't know what could be more relevant to the qualifications of a law enforcement officer than the question of whether or not he had been involved in the physical abuse of suspects, because if there was such involvement it would, as one of the witnesses put it, call into question the integrity of many cases and many investigations that were pending.

So, an investigation was held by Mr. Crank. The Court is not able to conclude, and does not conclude, that the investigation was a hoax. The Court believes that Mr. Crank undertook the investigation in good faith. The investigation did not produce any evidence of physical abuse, which is not surprising, because most of the persons interviewed appear to have been among the persons accused or among those persons who worked for the accused.

But, in any event, after the report of the investigation was made, it was then the job of the Defendant Munson to decide what to do, and he was faced with this situation: The Plaintiff had admitted being personally involved in physical abuse. He later denied being personally involved, and also denied ever having made the admission, and although Mr. Munson was not present on June 26th, Mr. Bentley was; he was present both on June 9 and on June 26th, and he testified, and the Court believes him, that on one occasion the Plaintiff admitted the involvement and on another occasion he not only denied the involvement but also denied having made the admission.

It is a question, in short, of determining whose witnesses are more persuasive on those points, and on the whole, the Court is persuaded that the Defendant's witnesses have carried that burden. The Court is not convinced that the reason given by them was merely pretextual, and, therefore, the Court holds for the Defendant and the Complaint will be dismissed.

Are there any questions about the Findings or Conclusions, Mr. Mays?

MR. MAYS: I had a question when you were going through the Findings, your Honor, but I am not sure that it is relevant at this time.

THE COURT: All right, sir. Mr. Lyon?

MR. LYON: No, sir.

THE COURT: All right. Is there anything further that needs to be done? A judgment will, of course, be

entered in accordance with these Findings and Conclusions. Anything further at this time?

MR. MAYS: Nothing further, your Honor.

THE COURT: All right. Mr. Marshal, we will be in recess.

COURT CRIER: All rise. Court is now in recess.

(Recess).

REPORTER'S CERTIFICATE

I, Thomas R. Lancaster, Official Court Reporter for the United States District Court for the Eastern District of Arkansas, Western Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth, to the best of my ability; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

s/Thomas R. Lancaster
Thomas R. Lancaster

APPENDIX E

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Thomas Womack,)
Plaintiff)

v. No. LR-76-C-320)

)
Lee Munson,)
Defendant)

JUDGMENT

In accordance with the findings of fact and conclusions of law announced in open court at the conclusion of the trial on February 16, 1979, the complaint is dismissed with prejudice this 20th day of February, 1979.

/s/: RICHARD S. ARNOLD,
United States District Judge.